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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 549

EDWARD F. WEINHEIMER, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

EDWARD F. WEINHEIMER, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISRICT OF COLUMBIA CIRCUIT

Petitioner, Edward F. Weinheimer, respectfully prays for writ of certiorari to review the decision and judgment of the United States Court of Appeals for the District of Columbia, entered on October 20, 1960, affirming the judgment of the District Court of the United States for the District of Columbia.

The Opinion Below

The opinion of the United States District Court of Appeals for the District of Columbia, has not yet been reported, but a copy of said opinion is attached hereto and prayed to be taken as a part hereof, marked Appendix No. 3.

Jurisdiction

The opinion of the United States Court of Appeals for the District of Columbia was rendered on the 20th day of October, 1960. Jurisdiction to issue the writ is found in the provisions of Section 240(a) of the Judicial Code (28 U.S.C.A., Sec. 1254).

Questions Presented

I

Whether it was error for the trial court to submit the case to the jury for its consideration, when the record shows that the government failed to sustain its burden of proof both on the law and the facts.

II

Whether it was error for the trial court to hold that the quantitative evidence rule had been satisfied, when the record shows to the contrary.

III

Whether it was error for the trial court to rule that the issue presented to it was "material" within the meaning of the perjury statute.

IV

Whether it was error for the trial court to permit a witness to testify as to the contents and requirements of the Interstate Commerce Commission Regulations, when the regulations themselves would be the best evidence.

Statute Involved

Title 18 U.S.C. Section 1621—Perjury

> Whoever, having taken an oath before a competent tribunal, officer, or person in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than Two Thousand Dollars ($2,000.00), or imprisoned not more than five (5) years, or both.

Statement of the Case

Petitioner, Edward F. Weinheimer, was served with a subpoena to testify before a Grand Jury sitting in the District of Columbia.

On August 28, 1959, the petitioner testified that he did not receive, from Exhibitor's Service Company, Inc., any sum of money other than his salary, expenses and as Christmas gifts. (Count One of Indictment: J.A. 3-6). On the same date, August 28, 1959, he denied receiving One Thousand Dollars ($1,000.00) in cash from Exhibitor's Service Company, Inc., alleged by the Government to have been received by him on or about August 15, 1957, and again on or about September 17, 1957. (Count Two of Indictment: J.A. 6-8).

Again, while before the Grand Jury on August 28, 1959, he denied receiving, while at the Rambler Motel in Des Moines, Iowa, during the month of August, 1957, any cash, currency, or money through the mail. (Count Three of Indictment: J.A. 8-14).

Petitioner, Edward F. Weinheimer, again appeared before the same Grand Jury on September 2, 1959, and denied

receiving "anything else" by registered mail other than checks which he acknowledged before the Grand Jury, while at the Rambler Motel, in Des Moines, Iowa. (Count Four of Indictment; J.A. 14-18).

That on September 2, 1959, he testified that he did not receive three (3) envelopes by registered mail which contained cash. (Count Five of Indictment; J.A. 19-21).

That on September 2, 1959, again in answer to the same line of interrogation, he testified that he received no envelopes from Exhibitor's Service Company, Inc., containing cash, while a guest at the Rambler Motel, Des Moines, Iowa. (Count Six of Indictment; J.A. 21-22).

Petitioner, on September 2, 1959, testified that while he was a guest at the Belcrest Hotel, Detroit, Michigan, he did not receive cash in two envelopes sent by registered mail from Exhibitor's Service Company, Inc. (Count Seven of Indictment; J.A. 22-26).

Again, on September 2, 1959, petitioner testified that he never, during his association with Exhibitor's Service Company, Inc., received One Thousand Dollars ($1,000.00) in cash from that Company or from Mr. George Callahan, Jr., its president.

At the trial the government produced Mr. Harold L. Burke, foreman of the Grand Jury, who testified that certain books, records, documents and reports of Exhibitor's Service Company, Inc., were subpoenaed (J.A. 27). That petitioner Weinheimer was subpoenaed (J.A. 28) and an oath administered (J.A. 28). He stated that the Grand Jury had not made a decision as to whether there were any false entries in the accounts of Exhibitor's Service Company, Inc. (TR. 37). That the matter pertaining to the possible violation of the ICC Act is still pending before the Grand Jury (J.A. 27). Mr. Burke stated that he would not say what records were before the Grand Jury, but the "pertinent" books and records were turned over (J.A. 29). He also testified that George Callahan, president of Exhibitor's Service Company, Inc., had testified before the Grand Jury

prior to petitioner being called as a witness (J.A. 29).

Frank Lacey, accountant for ESCO, testified that on two occasions he cashed Company checks for One Thousand Dollars ($1,000.00) and gave the money to Callahan, president of ESCO (J.A. 50 and J.A. 51-52).

Norman McDermott, postmaster at McKees Rocks, Pennsylvania Post Office, identified three receipts for three letters dated August 14, 1957 with the minimum value of $10.00 placed on them by the sender (J.A. 56-57).

Virgil Smith, formerly of the Rambler Motel, Des Moines, Iowa, stated petitioner signed for registered mail (J.A. 59).

There was testimony also that registered mail arrived for petitioner while he was a guest at the Belcrest Hotel, Detroit, Michigan.

Specification of Errors to be Urged

The Court of Appeals erred in sustaining the trial court because that Court erred as follows:

1. The Court erred in submitting the case to the Jury for its consideration where it had not been developed by the evidence that the questions asked appellant in his appearances before the Grand Jury were "material" to the inquiry, nor had it been shown that the appellant had received any money allegedly sent him in Des Moines and Detroit by Exhibitor's Service Company, Inc.

2. The Court erred in holding that the quantitative evidence rule had been satisfied, where there was no evidence, other than the statement of George Callahan, president of ESCO, that "money" had been forwarded to appellant in Des Moines and Detroit.

3. The Court erred in ruling that the questions asked appellant, his answers to which were the basis for indictment, were "material" to the subject matter of the investigation of the Grand Jury. It being apparent that the Grand Jury was concerned with whether ESCO had filed false returns and whether appellant received money in Des

Moines and Detroit, could not have been "material" to the investigation. Rather, it appears that how ESCO "characterized" the money allegedly sent, was the crux of the injury.

4. The Court erred when it permitted an FBI agent to testify to the contents and requirements of the ICC regulations. The agent testified that Account No. 4420, which the government contended was the account to which this money was charged, is designated as "office and other expenses, etc." This was the conclusion of the witness based upon his reading and interpretation of the regulation. Appellant contends that the regulation should have been produced and read to determine whether Account No. 4420 was designated by the regulation and applied to the case at bar.

Summary of Argument

Petitioner contends that the Court should not have submitted the case to the jury, but should have granted him motion for judgment of acquittal for the reasons (1) that the evidence presented by the government did not establish, as a matter of law, that the questions asked petitioner were "material" to the inquiry being conducted by the Grand Jury, and (2) that the government had failed to establish, as a matter of fact, that petitioner did receive "money" while a guest at the Motel in Des Moines and the Hotel in Detroit.

It appeared from the evidence that the Grand Jury was concerned with whether there had been false entries made in the yearly reports of Exhibitor's Service Company, Inc., required to be filed with the Interstate Commerce Commission. In order to bring a valid perjury prosecution, it became necessary to the government to show that the alleged perjurious answers given by petitioner were to questions "material" to the inquiry of the Grand Jury; and, that the answers were in fact perjurious. Neither "materiality" nor "perjury" were proved.

The Court ruled that the "two-witness rule," so called, had been satisfied although the only evidence that the "money" had been sent was the testimony of George Callahan, president of the Company under investigation, that he had sent it. The record is devoid of testimony that petitioner received the money allegedly sent, although he did receive registered mail while in Des Moines and Detroit.

The Court permitted an FBI agent, Edward W. Pennypacker, to testify that the ICC regulations provide that a uniform system of accounts will be kept and what account numbers are to be given in accordance with those regulations.

Reasons for Granting the Writ

The Court of Appeals decision conflicts with the applicable decisions of this Court in the following four ways:

I

INSUFFICIENCY OF THE EVIDENCE ON THE QUESTION OF MATERIALITY

As required by the Perjury Statute, Title 18-1621, the alleged perjurious testimony must concern "material matter." It is settled that the materiality of the false testimony assigned as perjury is a question of law for the Court. *Harrell v. United States*, 5th Cir. 1955, 220 F2d 516; *Carroll v. United States*, 1927, 16 F2d 951, CA 2 NY, cert denied 273 U.S. 763, 71 L ed 880).

Petitioner contends that the Court erred in submitting the case to the Jury for its consideration inasmuch as it had not been developed by the evidence that the questions asked petitioner in his appearance before the Grand Jury were "material" to the inquiry. Mr. Harold Burke, foreman of the Grand Jury, was interrogated concerning the purpose of the investigation of Exhibitor's Service Company, Inc., and he related the purpose was "to determine whether there

had been correctly entered in reports to be filed with the Interstate Commerce Commission accurate and true entries" (TR. 37).

The purpose having been thus established, it became encumbent upon the prosecution to satisfy the Court that the questions directed to the petitioner were "material" as required by the perjury statute. And this they must do beyond a reasonable doubt.

In order for any answer to be material it must, according to *Carroll* v. *United States, supra,* and *United States* v. *Hirsh,* 136 F2 976, 1943, Md. Cir., "have the effect or tendency to influence, impede or dissuade the Grand Jury from pursuing its investigation." The record is devoid of any testimony that the Grand Jury was influenced, impeded, or dissuaded from pursuing its investigation. On the contrary, Mr. Burke, the foreman, testified that the Grand Jury has not concluded, or made any decision on it (TR. 38). Further, it is respectfully contended, that since it is apparent that petitioner was not charged with the responsibility of filing reports with the ICC, but rather Exhibitor's Service Company, Inc., or its president, George Callahan, Jr., any questions directed to petitioner before the Grand Jury as to whether he received certain sums of money in Des Moines and Detroit, could not aid the Jury in determining whether, in fact, false entries and/or false reports had been filed by petitioner's employer.

The subpoena served upon petitioner indicated an investigation of possible violations of Title 49, USCA, Section 322-g.

This section concerns Motor Carriers and makes it a crime for a carrier engaged in interstate commerce to submit a false report to the Interstate Commerce Commission. The foreman of the Grand Jury testified that Callahan had testified prior to the petitioner being called. Callahan testified at the trial that his testimony was the same as that which he had given before the Grand Jury. This testimony was, that he had made false entries in his report when he

claimed credit for solicitor's expenses when in fact they were actually cash payments for labor peace and had been mailed to the petitioner who was at the time an employee of Callahan's company.

Petitioner, before the Grand Jury, denied receiving any of these sums and it was for this that he was convicted of perjury. Counsel for petitioner urged at trial, that Callahan having admitted making false entries before petitioner testified, the Grand Jury had already enough to indict Callahan and only called petitioner to persecute him and to make him a defendant on a perjury charge. The trial Court rejected this contention and the United States Court of Appeals in upholding the trial Court, said that the Grand Jury was not limited to matters covered by the subpoena but could be searching for possible violations of Taft-Hartley or the Anti-Racketeering Act.

The unfairness of this reasoning it is submitted, is obvious, particularly in view of the fact that petitioner, and his counsel, did not know until the day this case was argued, that Callahan had been granted immunity before he testified and therefore could not be prosecuted for violations of the Interstate Commerce Act. This fact was learned when counsel for the Government so stated during oral argument.

It is respectfully submitted that when that disclosure was made the entire plan of the Government became clear. Petitioner was deliberately subpoenaed under the Motor Carriers Act, with full knowledge that there could not be a prosecution thereunder, but that immunity could be granted petitioner and that he would be forced to testify about violations of Taft-Hartley, or commit perjury or be held in contempt for not answering. Had he been summoned under Taft-Hartley immunity could not be granted and he could assert his privilege under the Fifth Amendment.

The Government, under these circumstances, has clearly demonstrated that the questions asked of the petitioner were not material to any contemplated prosecution of Callahan, but was an effort to use pressure by subterfuge, to incrimi-

nate the petitioner.

The government failed to prove beyond a reasonable doubt that the questions asked appellant, and his answers thereto, were "material" to the Grand Jury's investigation. There being no testimony that petitioner's answers had the effect or tendency to influence, impede or dissuade the Grand Jury from pursuing its investigation, and materiality being an essential element of the offense of perjury, the government had failed in its proof, and the motion of appellant for a judgment of acquittal should have been granted.

II

EVIDENCE INSUFFICIENT TO SATISFY THE QUANTITATIVE EVIDENCE RULE

Before the government could contend that petitioner had perjured himself when he stated that he did not receive the Two Thousand Dollars ($2,000.00) allegedly forwarded by Callahan, it became necessary to prove that the money was in fact received by him in Des Moines, as well as Detroit. Frank Lacey, accountant for ESCO, testified that on two occasions he cashed checks in the amount of One Thousand Dollars ($1,000.00) each and turned the money over to Callahan (J.A. 50-52). Lacey further testified that on August 14, 1957, he received envelopes from Callahan which he mailed (J.A. 50). The record reflects that Callahan testified that he placed the money in the envelopes addressed to petitioner in Des Moines (J.A. 40-41). No one saw Callahan insert the cash in the envelopes, and appellant denied before the Grand Jury that the money was received by him. As this Court pointed out in *Young v. United States*, 212 F.2d 236, 94 US App DC 54, regarding the "two witness rule":

> "Properly stated it is that 'the uncorroborated oath of one witness is not enough to establish for purposes of conviction of perjury, the falsity of sworn testimony'."

It was required of the government to corroborate Callahan's testimony that the money was in fact placed in the

envelopes that were mailed to petitioner. The record is barren in this respect.

Virgil Smith, manager of the Rambler Motel, Des Moines, Iowa, stated that on or about August 15, 1957, petitioner signed for registered mail (J.A. 59).

There is no testimony in the record to indicate that appellant was observed removing cash from those envelopes, nor is there any evidence, other than Callahan's testimony, that there was cash in the mail appellant received at the Rambler Motel.

Lacey, the accountant, testified that on September 16, 1957, he cashed a check for $1,000.00 (J.A. 51-52), and gave the money to Callahan. There is no corroboration of Callahan's placing the cash in envelopes mailed to appellant in Detroit in September, 1957. Nor is there any testimony, or evidence, that any cash was received by petitioner in Detroit, he having denied under oath the receipt of cash on this occasion.

III

QUESTIONS PROPOUNDED TO PETITIONER WERE NOT MATERIAL TO INQUIRY

It must have been obvious to the Grand Jury that the Two Thousand Dollars ($2,000.00) about which petitioner was questioned could not have been "solicitor's expenses". Callahan testified that the money was forwarded by registered mail in the form of cash. Frank Lacey, accountant for Exhibitor's Service Company, Inc., stated that on two occasions he cashed checks for One Thousand Dollars ($1,000.00) and turned the money over to Callahan (J.A. 50-52). If Callahan designated this Two Thousand Dollars ($2,000.00) as "solicitor's expense" in his annual report to the ICC, he knew at the time of that designation that it was not a legitimate "solicitor's expense" since the evidence indicated that expenses were paid by check. The Grand Jury had the benefit of Callahan's testimony, together with

Lacey's on this score. And this, before petitioner testified before them (J.A. 29-30). To summarize Callahan's testimoney (1) the $2,000.00 was earmarked "solicitor's expense"; (2) expenses were paid by checks; (3) he never found out why petitioner wanted the money, and (4) he never was told what petitioner did with the money. This being so, the Grand Jury had to know it wasn't a legitimate expenditure.

So, it follows that with this quantum of evidence before the Grand Jury, it became obvious that whether petitioner received certain funds in Des Moines and Detroit could not be material in their determination as to whether Exhibitor's Service Company, Inc., had filed a false report with the Interstate Commerce Commission.

The instant case is likened, in this respect, to *United States* v. *Icardi*, April 19, 1956, 140 F. Supp. 383, where a subcommittee already had in its possession sufficient information on which to base a report to Congress, brought before it Icardi apparently for the sole reason of creating the opportunity for him to commit perjury.

As stated in *Fraser* v. *United States*, 6 Cir., 145 F2d 145, 149, certiorari denied 324 U. S. 842, 65 S. Ct. 586, 89 L. Ed. 1403, the test of materiality is whether the false testimony was capable of influencing the tribunal on the issue before it. In the present case Callahan having testified before the Grand Jury, and prior to petitioner, it was obvious that the designation of the $2,000.00 by Callahan as "solicitor's expense" in his report was a false statement. As in *Icardi*, the Grand Jury already had in its possession sufficient information to determine whether a false statement appeared in Callahan's report, and subsequent questions to petitioner as to whether he had "received" cash could not be of assistance to them. This is especially true when the designation of the money was the crux of the investigation and not the receipt of it.

Callahan had testified in this case that petitioner never told him why he wanted the money sent to him and when he

returned petitioner did not tell him what he had done with the alleged payment. Since it is a valid assumption that Callahan's testimony before the Grand Jury was the same as in the trial court, his testimony conclusively proved that a characterization of the money allegedly forwarded as "solicitor's expenses" was a false entry for the reason that if he didn't know why the money was requested, and he never determined the use to which it was put, he and the Grand Jury, had to know that when it was so labeled in the yearly report it was without basis in fact.

IV

THE COURT ERRED IN PERMITTING TESTIMONY OF ACCOUNT NO. 4420 AS PROVIDED FOR IN ICC REGULATIONS

Special Agent Edward W. Pennypacker, of the Federal Bureau of Investigation, was called as a witness for the government for the purpose of testifying that the ICC Regulations provide that a uniform system of accounts will be kept and to specifically identify the number assigned to the Traffic Account (J.A. 124 125).

Over the objection of counsel (J.A. 125) the witness was permitted to testify that the regulations number the various accounts and provide that a uniform system of accounts be kept; that under Account No. 4420, which is the Traffic Account, are entered office and other expenses as a subcategory and provides in a broad sense the charging of expenses by officers and employees in connection with traveling, postage, telephone, meals and hotels; that Account No. 4420 is created by the ICC and a licensee of that agency is required to maintain such an account. He also testified that this was the account number in the yearly report to which the money in question was charged. This latter testimony was the only evidence of the entry in the account. The yearly report which is alleged to have reflected the entry was not in evidence.

The specific objection to this line of interrogation was that proof of what the regulations require are the regulations themselves (J.A. 125).

Account No. 4420 has significance because, according to the witness, the $2,000.00 was charged to that account. His testimony that the regulation required the maintaining of this account, together with what the account contained, were prejudicial to the petitioner for the reason that it permitted the jury to conclude on the basis of this evidence, that the regulations and the account did so indicate.

CONCLUSION

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari should be granted.

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APPENDIX #3

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,698

EDWARD F. WEINHEIMER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Decided October 20, 1960

Mr. H. Clifford Allder, with whom *Mr. Kenneth D. Wood* was on the brief, for appellant.

Mr. Paul J. Komives, Attorney, Department of Justice, with whom *Assistant Attorney General Wilkey*, and *Messrs. Oliver Gasch*, United States Attorney, and *Plato C. Cacheris*, Attorney, Department of Justice, were on the brief, for appellee. *Mr. Carl W. Belcher*, Assistant United States Attorney, also entered an appearance for appellee.

Before WASHINGTON, BASTIAN and BURGER, Circuit Judges.

BASTIAN, *Circuit Judge*: Appellant was indicted, tried and convicted of the crime of perjury arising from his testimony before a Federal grand jury which had before it an investigation of possible violations of the laws relating to interstate commerce. [49 STAT. 565, and amend-

ments thereto.]. The grand jury was particularly inquiring into the accuracy of certain financial statements filed by Exhibitor's Service Co., Inc. [Esco] with the Interstate Commerce Commission, of which Esco is a licensee.

Callahan, president of Esco, testified that appellant was originally employed as a solicitor and subsequently became an executive of the company; that on two occasions, when Esco was threatened with union difficulties, he had been instructed by appellant to send him $1,000 in cash, and that appellant had refused to divulge the use to which he planned to put the money. Callahan further testified that on each occasion he had acceded to appellant's request and that, in each instance, an impending strike was cancelled.

Callahan stated that in August 1957, upon appellant's instructions, he had caused Lacey, bookkeeper for Esco, to make out a company check for $1,000, to cash the check and to return the cash to him; that he [Callahan] then placed the cash in three separate envelopes addressed to appellant and gave the envelopes to Lacey with instructions to send them by registered mail. This entire procedure was verified by Lacey, except that Lacey did not actually see Callahan place the money in the envelopes. Post office officials confirmed the fact that three pieces of registered mail were sent by Esco to appellant on the date claimed by Callahan and were signed for by appellant. Another witness testified that he had seen appellant receive and sign for the registered mail but that he had not seen the contents.

Similar actions were testified to in connection with the second $1000 sent to appellant in September 1957.

Both Callahan and Lacey were questioned by the grand jury as to how these two items were recorded in the books of the company. They testified that they were charged to "solicitor's expenses," although usually appellant submitted vouchers for his expenses and was then reimbursed by check.

When appellant was questioned by the grand jury, he denied receiving the two $1000 items, by registered mail or otherwise, from Esco or any of its officers. The indictment was based on this denial, which was reiterated in response to varying questions.

Appellant vigorously presses on us a number of grounds for reversal. First, he urges that the alleged perjured testimony was not material to the grand jury investigation, which he claims was for the purpose of ascertaining whether Esco and Callahan had violated the rules of the Interstate Commerce Commission by filing falsified reports. He claims that the admissions of Callahan and Lacey had already furnished the grand jury with ample evidence of such violation. Second, appellant urges that a perjury conviction cannot be founded upon the uncorroborated testimony of a single witness, and that the record in the instant case is devoid of legally sufficient corroborating evidence. Third, appellant points out that an agent of the Federal Bureau of Investigation, a trained accountant, was permitted to testify, over objection, as to the meaning of an account number in Esco's books and as to an Interstate Commerce Commission regulation requiring such an account to be kept.

We think that appellant's claim of immateriality is based on a misconception of the nature of the grand jury investigation. Appellant points to the fact that the grand jury already had before it ample evidence to establish a false reporting violation. Even putting aside the fact that appellant's testimony as to the actual use of the money might have established that the report was correct, appellant's argument assumes that the grand jury was confined in its investigation to matters pertaining to violations of statutes relating to the Interstate Commerce Commission. This is not the case.

In *Blair v. United States*, 250 U.S. 273 (1918), the Supreme Court held that grand jury investigations are not to be narrowly limited by forecasts of probable results:

and, in *Sullivan* v. *United States*, 348 U.S. 170, 173 (1954), that Court referred to the "well-recognized power of the grand jury to consider and investigate any alleged crime within its jurisdiction." The fact that appellant, at the time the money was received by him, was stopping at the same hotel as were certain union officers with whom he was acquainted, could reasonably have impelled the grand jury to search for possible violations of the Taft-Hartley Act, 29 U.S.C. § 186, or the Anti-Racketeering Act, 18 U.S.C. § 1951.

Appellant's claim that the Government failed to satisfy the stringent requirements of the law as to proof of perjury must also fail. Circumstantial evidence is sufficient when it tends to support the witness directly and in important respects. *Cook* v. *United States*, 26 App.D.C. 427 (1906); see also *Weiler* v. *United States*, 323 U.S. 606 (1945); *Doto* v. *United States*, 96 U.S.App.D.C. 17, 223 F.2d 309 (1955). In the case before us, the corroborating evidence supports Callahan's testimony in every detail except for the actual observation of Callahan's placing of the cash in the envelopes. On this point, Lacey testified that in August 1957, within a very few minutes after he had cashed the checks and given the proceeds to Callahan, he was given the sealed envelopes by Callahan for registered mailing. We think there was sufficient corroboration, particularly since the only explanation by appellant of the contents of the registered mail received by him was that all of the envelopes contained checks. As a matter of fact, the only checks issued to him by Esco or Callahan in August were variously dated, rather than on the same day, and all of the checks bore dates subsequent to the date on which appellant received the first set of registered mail.[1] The two occasions in ques-

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[1] Appellant did not testify at the trial. In his testimony before the grand jury he stated that on the first occasion when he received registered mail from Esco, August 15,

tion were the only times that registered envelopes were mailed to appellant on the same days. As in *Doto* v. *United States, supra,* the evidence here was not merely the oath of one person but was, as well, cumulative evidence which met the standards applicable to perjury cases.

As to the testimony of the agent of the Federal Bureau of Investigation, appellant does not challenge the correctness of the testimony, nor does he assert that his case would have been furthered in even the smallest particular had the regulation in question been proved, as he asserts it should have been, by an Interstate Commerce Commission official. Therefore, even if we were to find error on this point, it would be harmless.

We have examined the other errors asserted by appellant and find no error.

Affirmed

1957, in Des Moines, the envelopes contained salary and expense checks. The checks which he identified as having been received by him at that time were dated August 17, 23, 24 and 30, respectively, and he denied receiving any three of the checks on the same day. Appellant also emphatically denied receiving any cash by registered mail.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 549

EDWARD F. WEINHEIMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (J.A. 136) [1] is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 20, 1960. On November 18 the time for filing a petition for a writ of certiorari was extended to November 26, 1960, by order of Chief Justice Warren. The petition for a writ of certiorari was filed on

[1] "J.A." refers to the Joint Appendix used in the Court of Appeals which is on file with the Clerk of this Court.

November 26, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the false testimony on which a perjury prosecution was based was material to the grand jury's inquiry.

2. Whether the evidence was sufficient to meet the quantum of proof required for perjury prosecutions.

3. Whether the trial court properly permitted the testimony of an expert witness in regard to the uniform accounting system in force under the regulations of the Interstate Commerce Commission.

STATEMENT

Petitioner was convicted in the District Court for the District of Columbia on eight counts charging perjury before a grand jury of the District of Columbia on August 28, September 2, and September 3, 1959 (J.A. 3-26). He was given concurrent sentences of one to three years' imprisonment on all eight counts (J.A. 134). On appeal the conviction was affirmed.

A. *Proof of Materiality.* At the trial, the foreman of the grand jury, Mr. Harold L. Burk, testified concerning the matters under investigation by the grand jury. These matters concerned possible violations of § 222(g) of the Interstate Commerce Act (49 Stat. 565, as amended, 49 U.S.C. 322(g))—specifically, whether certain reports to the Interstate Commerce Commission and the pertinent records of Exhibitors' Services Company, Inc., a licensed motor carrier, were inaccurate (J.A. 27). The foreman identified a copy of a

report to the Commission as an exhibit before the grand jury[2] (J.A. 29-31). The report reflected an item for office and other expenses which, it was suspected, was not so attributable (J.A. 28, 90, 92). The president of Exhibitors' Services Company, Inc., was called as a witness before the grand jury and testified that the moneys involved had been sent to petitioner (who held a position with the company in a labor relations capacity) in connection with petitioner's efforts to forestall an imminent strike (J.A. 29, 34, 39, 42, 43, 45). The president, Mr. Callahan, was never told how the money was used (J.A. 41, 45, 46). Petitioner was thereupon called as a witness before the grand jury and was compelled to testify under a grant of immunity[3] (J.A. 69). He denied receiving the moneys in question (J.A. 73; 74-75, 84-90, 92, 95-96, 98-100, 113-114, 117-119). Those denials were the basis of the charge of perjury.

B. *Proof of Perjury.* The government's principal witness at the trial was the president of Exhibitors' Services Co., Mr. George F. Callahan, Jr. Mr. Callahan detailed the recent history of his company's labor problems, and the fact that petitioner was hired, in January 1957, in the hope that he would be able to help in the solution of those problems (J.A. 31-34). Petitioner had a history of labor union affiliation, and was personally acquainted with some of the chief figures in the Teamsters Union, with which Exhibitors' Services Co. was dealing (J.A. 34-35, 75-77). Peti-

[2] The report was later admitted into evidence at the trial as Government's Exhibit 23 (J.A. 124).

[3] Act of February 25, 1903, 32 Stat. 904, 49 U.S.C. 47.

tioner, in the course of his efforts to solve the company's labor problems, made various trips around the country to meet officials of the union (J.A. 35-37). On one such trip, in August 1957, while in Des Moines, Iowa, where he went to meet a top Teamster official named Barney Baker, he placed a telephone call to Mr. Callahan and requested that $1,000 in cash be sent to him immediately (J.A. 37-39). When pressed for the reason, he stated that Mr. Callahan should "trust" him (J.A. 39). Mr. Callahan thereupon caused a company official, Mr. Frank Lacey, to write out a check for $1,000 on the company's funds, go to the bank and cash the check, and return the proceeds to him (J.A. 40). That same day envelopes were made out and addressed to petitioner at his address in Des Moines, the cash was placed in them, the envelopes sealed, and Mr. Lacey was directed to send them by registered mail (J.A. 40-41). Mr. Lacey testified concerning the obtaining of the funds and the mailing of the envelopes (J.A. 47-51). He also testified concerning the entry of the item covering the thousand-dollar check in the company's books (J.A. 52-53). The check was introduced in evidence as well as the entries in the cash disbursements book of the company (J.A. 40, 121).

The registered mail receipts signed by petitioner were introduced in evidence (J.A. 56, 61). Postal officials from the sending and receiving post offices testified concerning the documents and also concerning the relevant postal regulations which require that registered mail must be sealed (J.A. 54-57, 60-61, 64). Finally, the proprietor of the Des Moines motel at which petitioner was staying testified that petitioner

had made inquiry about when mail could be expected and that he had witnessed petitioner signing for and receiving registered letters on August 15 (J.A. 57-60).

A similar story was unfolded concerning the mailing to petitioner, pursuant to another phone call from him, of another $1,000 in September 1957 to a hotel in Detroit at which he was sharing a room with a Teamster official (J.A. 41-45, 51-53, 62-65). This occurred just prior to the calling-off of an imminent strike (J.A. 43).

Mr. Callahan also testified that he questioned petitioner upon his return regarding the moneys that had been sent to him (J.A. 41, 45). Mr. Callahan stated:

> I tried to press him for some further explanation relative to the disposition of the moneys. And he got rather aggravated and said to me, "I would cut off my right arm before I would tell you what I did" [J.A. 46].

Petitioner did not testify at the trial. In his testimony before the grand jury he stated that on the first occasion when he received registered mail from Esco (Exhibitors' Services Co.), in August 1957, in Des Moines, the envelopes contained salary and expense checks. The checks which he identified as having been received by him at that time were dated August 17, 23, 24 and 30, respectively, and he denied receiving any three of the checks on the same day. Petitioner also denied receiving any cash by registered mail (J.A. 92-94).

ARGUMENT

1. Petitioner attacks the materiality of the questions put to him as to whether he received the money reflected in the company books as office expenses, arguing that, as to the false-report charge being investigated, the grand jury already knew that the report was false and that his testimony could have no bearing on any criminal charge because the company officials (the president and bookkeeper) had previously been granted immunity. Petitioner's argument overlooks the possibility that the corporation could be prosecuted, apart from its agents. It obviously would be material to any charge against the corporation to have testimony as to possible violations of the appropriate statutes. Moreover, aside from the issue of the truth or falsity of the report, it was within the scope of the grand jury's competence to follow up the suggestion, inherent in the testimony of the company officials, that the moneys had actually been used to buy off labor trouble, and to determine whether petitioner's disbursement of the funds indicated a violation of Section 302 of the Taft-Hartley Act (61 Stat. 157, 29 U.S.C. 186) or of the Hobbs Anti-Racketeering Act (18 U.S.C. 1951). *Sullivan* v. *United States*, 348 U.S. 170, 173. Petitioner's contention that he was "persecuted" by being called before the grand jury after the company officials (Callahan, the president, and Lacey, the bookkeeper) had been called to testify and had thus been granted immunity from prosecution by operation of statute, is without merit. Petitioner, too,

received immunity, and the grand jury could not be expected to anticipate that he would lie to it under oath.

Petitioner contends that the record is devoid of testimony to establish that the grand jury was *in fact* delayed, obstructed, or influenced by the alleged false testimony. It is puzzling how he can make such a contention, and then himself allude to the foreman's testimony that the grand jury had not been able to conclude its investigation, or come to a decision in the matter. Moreover, even if there were no testimony with regard to the actual obstruction of the grand jury, the government's proof would not be deficient, since it is not the actual effect of the false statement that is at issue, but whether the false statements have a "natural effect or tendency" to obstruct the investigation. *Carroll* v. *United States*, 16 F. 2d 951, 953 (C.A. 2), certiorari denied, 273 U.S. 763. See *United States* v. *Russell*, 255 U.S. 138, 143, to the effect that, on a charge of obstructing justice, success of the attempt need not be shown.

Even if the grand jury had known to a certainty that the financial statements were false, it was justified in calling petitioner as a witness. The duties of the grand jury are summarized in *Carroll* v. *United States*, 16 F. 2d at 953, certiorari denied, 273 U.S. 763, as follows:

> "* * * Its investigation and full duty is not performed unless and until every clue has been run down and all witnesses searched for and examined in every proper way to find if a crime has been

committed, and to charge the proper person with the commission thereof. * * *

A grand jury can never be sure it has enough evidence, nor on the other hand that contrary evidence which explains the seeming violation is not present. It can only be sure whether or not it has done a thorough job of investigating, *i.e.*, whether or not it has called all witnesses with any possible relevant information to offer to its task of investigating all violations of the criminal law. Cf. *Blair* v. *United States*, 250 U.S. 273, 281-282.[4]

2. The attack on the sufficiency of the evidence to meet the special requirements of proof of perjury is without merit.

As to the mailing of the money to petitioner, Callahan was a direct witness that he placed money in the envelope. The corroboration offered was not that of a second eye-witness to this incident, but the perjury rule does not require the corroboration to be in the form of a second direct witness. It is well-settled that corroboration may be in the form of circumstantial evidence. *Cook* v. *United States*, 26 App. D.C. 427, 430; *Hashagen* v. *United States*, 169 Fed. 396, 399 (C.A. 8); *United States* v. *Palese*, 133 F. 2d 600, 602 (C.A. 3); *Segal* v. *United States*, 246 F. 2d 814, 816 (C.A. 8), certiorari denied, 355 U.S. 894. Whether the corroboration offered was "trustworthy" is for

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[4] The case of *United States* v. *Icardi*, 140 F. Supp. 383 (D. D.C.), relied upon by petitioner, is inapposite. That involved a legislative inquiry about a murder overseas which the judge found to be an inquiry into guilt or innocence, not for a legitimate legislative purpose.

the jury to determine, under the appropriate instructions. *Weiler* v. *United States*, 323 U.S. 606, 610-611. The corroboration in the case at bar was abundantly sufficient. It was Callahan's testimony that, in order to send the moneys to petitioner, he first obtained the funds by having checks made out on the company's account payable to Lacey, and then upon the return of the money to him, placed it in envelopes addressed to petitioner for the occasion, and had them sent by registered mail to petitioner, the first time in Des Moines, Iowa, the second time in Detroit, Michigan (J.A. 39-41, 43-45). The company official, who wrote out and cashed the checks in the first instance, returned the money to Callahan, and then took the sealed envelopes to the post office, corroborated Callahan's testimony in every respect (J.A. 49-52). The checks were introduced into evidence, and, in addition, the books and records of the company contained entries reflecting the thousand dollar checks (J.A. 39, 44, 49, 51, 52). That was itself sufficient corroboration. Compare *United States* v. *Searcy*, 180 F. 2d 837 (C.A. 3), certiorari denied, 339 U.S. 979, a case in which books of account showing payments were held to constitute sufficient circumstantial corroboration of the payment.

As to receipt of the registered mail by petitioner, petitioner's counsel admitted to the jury (J.A. 128):

> There is no dispute about that. That evidence is unrefuted. He did receive the mail.

Thus, the only question was whether the envelopes which petitioner admittedly received were the same envelopes which Callahan sent, that is, the envelopes into which Callahan had placed the money. As to this, the sequence proved at the trial was as follows: Mr. Callahan testified that he placed the money requested by the petitioner into envelopes, sealed the envelopes, and gave them to Mr. Lacey with instructions to mail them to petitioner. Mr. Lacey testified that he took the envelopes given him by Mr. Callahan and went to the post office, where he deposited them by registered mail. The post office documents were then produced. These included the registered mail receipts which petitioner signed. In addition, a witness testified who saw petitioner sign the receipts in Des Moines and receive his mail, and post office officials testified that registered mail must be sealed.

This evidence, it is submitted, is direct proof of the fact that petitioner received the envelopes containing the money. That some slight inference might be required does not detract intrinsically from the nature of direct proof. *Radomsky* v. *United States*, 180 F. 2d 781, 783 (C.A. 9). The cases do not, in every instance equate the direct proof required in such prosecutions with immediate eye witness testimony on the fact issue. *United States* v. *Wood*, 14 Pet. 430. See *United States* v. *Collins*, 272 F. 2d 650 (C.A. 2), certiorari denied, 362 U.S. 911, where on a charge that the defendant falsely swore that he had signed certain minutes of a union meeting during a specified period of time, the Government produced evidence

that the particular kind of type used to type the minutes had not been in existence until after the period sworn to by the defendant. The court of appeals, in affirming the conviction, stated (272 F. 2d at 652):

> * * * Whether the evidence is "direct" in the sense in which the term is usually used should not be the criterion here. The test should be rather whether the evidence is of a quality to assure that a guilty verdict is solidly founded. * * *

See also *Doto* v. *United States*, 223 F. 2d 309 (C.A. D.C.), certiorari denied, 350 U.S. 847.

3. Petitioner complains that the trial court improperly permitted an expert witness for the Government to testify concerning the meaning of an account number (4420) to which certain items in the company's ledger were to be posted. At one point the witness was asked the significance of certain numbers assigned to the various accounts and, over objection, he stated that the Interstate Commerce Commission had a uniform accounting system which its licensees were required to follow, that standard account numbers existed which stood for various account names, and that account number 4420, to which the entries in the company's books regarding the checks in question were to be posted, stood for office and other expenses (J.A. 124-126). The objection to the inquiry was stated to be that the regulations of the ICC were themselves the best evidence of their nature and contents, and that the witness' testimony would be hearsay (J.A. 125). Petitioner does not, and could not, contend that the

testimony was not an accurate statement of the regulations. See 49 C.F.R. 182.4420.

There is no showing that the trial court abused its discretion in permitting the answers. The rule is that a properly qualified expert witness may testify concerning the meaning of entries in books of account. *Bank of Vance* v. *Crowder*, 194 N.C. 331, 139 S.E. 604. Here, the questions involved a minor and collateral matter, not related to the issues to be submitted to the jury, and the trial court could have taken judicial notice of the regulation. That it permitted an expert witness to give the pertinent information was not prejudicial to petitioner, where the accuracy of the testimony is not disputed.

In any event, it should be recognized that (1) the testimony in question was accurate, (2) it related only to the issue of materiality which was an issue of law for the court and not for the jury, and (3) the testimony was merely corroborative of earlier testimony relating to materiality. For these reasons, and because the testimony did not relate to issues involving petitioner personally, its allowance, if it was error at all, was, as the Court of Appeals stated, at most harmless error.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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